Filed 3/24/09 Byrd v. Colonial Yacht Anchorage CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STEPHEN BYRD, Plaintiff and Respondent, v. COLONIAL YACHT ANCHORAGE, INC., Defendant and Appellant.	B204888 (Los Angeles County Super. Ct. No. NC042202)

APPEAL from an order of the Superior Court of Los Angeles County, Judith A. Vander Lans, Judge. Affirmed.

Law Offices of Mark D. Holmes and Mark D. Holmes for Defendant and Appellant.

Brennan, Wiener & Associates and Robert A. Wiener for Plaintiff and Respondent.

Colonial Yacht Anchorage, Inc. appeals from the denial of its petition to compel arbitration. We find no error and affirm.

FACTUAL AND PROCEDURAL SUMMARY

In 1974, respondent Stephen Byrd purchased a 32-foot fiberglass sailboat named "Revelry" (the vessel). The vessel, built in 1938, had been neglected for many years and was in very poor condition. In 2002, Byrd brought the vessel to Colonial for repairs. The vessel was damaged even further during the transport. Between June 2002 and June 2004, Colonial performed repairs on the vessel. Despite the extensive work, when Byrd had the vessel inspected in June 2004, he was told it was not seaworthy. According to the report by Hans Jergen Andersen, a marine surveyor, "The owner of this vessel approached the restoration backwards by painting the hull instead of fixing the structural deficiencies of the subject vessel. This vessel needs structural repairs that will total more than the value of the vessel when completed. At present the vessel is capable of floating in a slip if undisturbed and is not navigated only if there is an automatic bilge alarm and a larger automatic bilge pump. In addition a larger battery charger is necessary and the batteries need to be relocated to a higher position on the vessel."

Byrd had paid Colonial approximately $82,000 for repairs to that point, but because of the condition of the vessel, he withheld the final payment. In February 2005, Colonial sued Byrd for breach of contract and debt on an open book account (*Colonial Yacht Anchorage, Inc. v. Byrd* (Super. Ct. L.A. County, No. 05N00113), the original action). The case was filed as a limited jurisdiction action, since the amount in controversy was $10,425.[1]

Byrd answered and filed a cross-complaint for damages. He alleged Colonial breached their oral agreement by failing to complete repairs on his vessel, "by failing to

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[1] As we explain, the parties ultimately agreed Byrd owed Colonial $7,400, which he paid.

competently perform repairs made on the vessel and by overcharging for the repairs which were made." He also alleged that Colonial was negligent in "failing to exercise reasonable care in making repairs and providing services on his vessel." He sought damages "for remedying negligent repairs, cost of completion of repairs, loss of use, loss of market value, cost of investigation and diagnosis of the defects, plus interest and costs of suit." Byrd later dismissed the negligence cause of action, and Colonial answered the cross-complaint.

Trial was set for October 5, 2005. At the September 1, 2005 mandatory settlement conference, the trial judge suggested that the parties agree to adjudicate the matter by means of binding arbitration. Counsel conferred with their clients, and informed the court the parties would agree to binding arbitration. The minute order reflects that the "[c]ase did not settle. Referred for binding arbitration (voluntary) completion date 12-12-05." The court ordered the parties to file a written stipulation for binding arbitration by September 12, 2005. The case was continued to September 15, 2005 for status conference, but no appearance would be required if the stipulation was filed.

According to the "Stipulation for Binding Arbitration" (the stipulation) filed on September 14, 2005, "Colonial and Byrd wish to fully and finally adjudicate the disputes between them arising out of the Complaint and Cross-Complaint (the 'Dispute');" and "hereby stipulate and agree under the terms and conditions that follow to submit the Dispute to binding arbitration before a single, paid, arbitrator, as may be mutually agreed between Colonial and Byrd." The stipulation set out various terms regarding costs, admissibility of evidence, and the conduct of the arbitration. Under the stipulation, Byrd could not conduct any discovery prior to the arbitration because he had sought none prior to the discovery cut-off. Colonial would be allowed to depose Byrd and Byrd's appointed shipwright. The parties agreed that the applicable substantive law was the federal maritime law, and that the applicable procedural law was California law. The stipulation was signed by the attorneys, not by the parties.

Byrd appeared for deposition on December 12, 2005. During the deposition, counsel stipulated to continue the deposition to January 13, 2006. According to Byrd, he

first discovered the existence of the stipulation to arbitrate on January 2, 2006, and he promptly and consistently disavowed it, claiming his attorney had no authority to sign the stipulation on his behalf. Byrd retained a second attorney to supervise his first attorney's handling of the case. The first attorney refused to withdraw the stipulation unless Byrd paid him $5,000. Instead, counsel for both sides agreed Byrd would pay Colonial $7,400, the full amount Colonial sought in its complaint, and the parties would request a mutual dismissal of the action without prejudice. That was done, and the original action was dismissed without prejudice on March 13, 2006.

On June 28, 2006, Byrd, now represented by the second attorney, filed a second action against Colonial, this time in Santa Barbara Superior Court (*Byrd v. Colonial Yacht Anchorage, Inc*, No. 1220795; (the second action)). The parties stipulated to transfer the case to the San Pedro location of the Los Angeles Superior Court. The second amended complaint, which is the charging pleading, alleges causes of action for breach of contract, fraud based on misrepresentation and concealment, violation of the Consumers Legal Remedies Act (Civ. Code, § 1770), and violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.).

Colonial brought a petition to compel arbitration, based on the September 14, 2005 stipulation. Byrd filed opposition. After hearing, the court denied the petition, finding Colonial "has not established that there is an enforceable written agreement to arbitrate applicable to Plaintiff's claims. The stipulation for Binding Arbitration entered into in Case No. 05N00113 is by its own terms limited to resolution of the complaint and cross-complaint in that action." Colonial filed a timely appeal from the order denying its petition.

DISCUSSION

Colonial argues the trial court should have compelled arbitration of this dispute because it is based on the same facts and circumstances as those underpinning the stipulation for arbitration entered into in the first action.

Colonial sought to compel arbitration under Code of Civil Procedure section

1281.2, which provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists*, ..." (Italics added.) As we explain, we agree with the trial court's conclusion that there was no agreement to arbitrate applicable to the second action.

"The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract." (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) The court should attempt to give effect to the parties' intentions in accordance with the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made. (*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, 771.) "Where, as here, the language of an arbitration provision is not in dispute, the trial court's decision as to arbitrability is subject to de novo review." (*Ibid.*)

The agreement upon which Colonial relies is the September 2005 stipulation entered into in the original action. A stipulation is a contract, and is governed by the usual rules applicable to the construction of contracts. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

The agreement to arbitrate was signed and filed as a pleading in the original action, captioned "Stipulation for Binding Arbitration." Its introductory provisions delineated the scope of the agreement:

"The following is a stipulation for binding arbitration between all parties in the above-captioned matter.

"WHEREAS Plaintiff and Cross-Defendant, Colonial Yacht Anchorage Inc. ('Colonial') has filed a Complaint against Stephen Byrd for Breach of Contract and Open Book Account; and

"WHEREAS Defendant and Cross-Defendant [sic] Stephen Byrd ('Byrd') has filed a Cross-Complaint for breach of contract against Colonial; and

"WHEREAS Colonial and Byrd wish to fully and finally adjudicate the disputes between them arising out of the Complaint and Cross-Complaint (the 'Dispute'); and

"WHEREAS, Colonial and Byrd wish to spare themselves, the expense and uncertainty of a trial before the above Court, or an appeal from any judgment from such Court;

"THEREFORE, the parties hereby stipulate and agree under the terms and conditions that follow to submit the Dispute to binding arbitration before a single, paid, arbitrator, as may be mutually agreed between Colonial and Byrd."

The agreement explicitly defines the subject for arbitration as "the disputes between them arising out of the Complaint and Cross-Complaint (the 'Dispute') . . . ." It differs from typical pre-litigation contractual arbitration provisions, which provide for arbitration of disputes arising from the underlying relationship between the parties. (See *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 543 [parties to a marketing and development contract agreed to arbitrate "'[a]ny disputes over this Agreement . . . .'"]; *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1241 [employee agreed to arbitrate "'any dispute arising out of my employment . . . .'"].)

The plain language of the arbitration agreement provides for arbitration of "the Dispute," a term of art defined as the original action; it does not provide for arbitration of all disputes between the parties arising from, or relating to repair of the vessel. The original action involved breach of contract and open book account causes of action by Colonial, and a breach of contract cause of action by Byrd. Before the arbitration took place, Byrd paid the amount in dispute to settle Colonial's complaint, and the parties jointly requested dismissal of the complaint and cross complaint. Once the court did that, Colonial and Byrd no longer had "disputes between them arising out of the Complaint and Cross-Complaint" which were subject to the stipulation for binding arbitration. The trial court properly concluded, as do we, that the stipulation was for arbitration of the original action; it did not constitute an agreement to arbitrate the claims raised in the second action.

Our conclusion renders it unnecessary to consider whether Byrd agreed to arbitration in the original action, whether that agreement was unconscionable, whether this case is governed by federal maritime law, or the numerous other arguments raised by the parties.

DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.